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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 744

GEORGE OLSHAUSEN, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
Petitioner.

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Subject Index

	Page
Opinion of lower courts	2
Jurisdictional statement	2
Questions presented for review	2
Constitutional provisions and statutes involved	4
Statement of the case	4
Jurisdiction of lower courts	6
Reasons for granting writ of certiorari	6
1. Denial of jury trial in violation of VIIth Amendment	6
2. The Court of Appeals goes contrary to the language of Congress and the opinion in C.I.R. v. Acker, 361 U.S. 87, 4 L.Ed. 2d 127, in holding penalties under 1939 Sec. 294(d)(1)(A) to be within the deficiency notice statutes	14
3. Reversed burden of proof violates due process clause of Vth Amendment (a) generally and (b) as applied	18
a. Reversed burden of proof unconstitutional generally	18
b. Reversed burden of proof unconstitutonal as applied	22
4. Court of Appeals goes contrary to Felton v. U. S., 96 U.S. 699, and related cases, in holding "willful neglect" sustained by acceptance of executive interpretation	23
Conclusion	25

Table of Authorities Cited

Cases	Pages
Barnard v. B'd Education (1898), 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. R. 706, 52 P. 317	20
Beacon Theatres v. Westover, 359 U.S. 500	7, 8
Buttfield v. Stranahan, 192 U.S. 476	14
C.I.R. v. Acker, 361 U.S. 87, n. 3, 4 L.Ed. 2d 127, 130, n. 3	4, 6, 9, 14, 15, 16, 17
Cheatam v. U. S. (1876), 92 U.S. 85	13
City of London v. Wood (1703), 12 Mod. 669, 88 Eng. Rep. R. 1592	19, 20
Davis v. Dudley, 124 F.S. 426	15, 16
Day v. Savadge (1724), Hobart 85, 80 Eng. Rep. R. 235	19
Dimes v. Grand Junction Canal (1852), 3 H.L. Cas. 759, 10 Eng. Rep. R. 301	20
Ely & Walker Dry Goods Co. v. U. S., 34 F. 2d 429	17
Ex parte Cornwell (1905), 144 Ala. 471, 39 So. 354	20
Felton v. U. S. (1878), 96 U.S. 699	13, 15, 22, 23, 24
Findley v. Smith (1896), 42 W. Va. 299, 26 S.E. 370	20
Flora v. U. S., 357 U.S. 63	13
Gregory v. Cleveland C. & C.R. Co. (1854), 4 Ohio St. 675	20
Guessefeldt v. McGrath, 342 U.S. 308	15
Heikinnen v. U. S., 355 U.S. 273	22, 23, 24
Helvering v. Mitchell, 303 U.S. 396	13
Hepner v. U. S., 213 U.S. 103	13
Landfear v. New Orleans (1832), 4 La. 97, 23 Am. Dec. 477	19
Leimer v. Woods, 196 F. 2d 828	7, 8, 9, 10
Manley v. Georgia, 279 U.S. 1	18
McKeon v. Central Stamping Co., 264 F. 385 (C.C.A. 3)	12
Morrison v. California, 291 U.S. 82	18
Moses v. Julian (1863), 45 N.H. 52, 84 Am. Dec. 114	20
Murdock v. U. S., 290 U.S. 389	22
Myers v. C.I.R., 28 T.C. 12	16, 17

Pages

Nettleton's Appeal (1859), 28 Conn. 268 20

Oceanic Nav. Co. v. Stranahan, 214 U.S. 320 14

Passavant v. U. S., 148 U.S. 214 14
Pearce v. Atwood (1816), 13 Mass. 324 19
Patchen v. C.I.R., 258 F. 2d 544 22

Root v. L.S. & M.R.S. Co., 105 U.S. 189 12

Schneider v. U. S., 119 F. 2d 215 17
State ex rel. Colcord v. Young (1893), 31 Fla. 594, 19 L.R.A. 636, 34 Am. St. R. 41, 12 So. 673 20
State, Winans Pros. v. Crane (1873), 36 N.J.L. 394 20
Stockwell v. White Lake (1871), 22 Mich. 341 20
Stuart v. Com. (1895), 91 Va. 152, 21 S.E. 246 20

Tot v. U. S., 319 U.S. 463 18
Town of Grand Chute v. Winegar, 82 U.S. 373 12
Tumey v. Ohio, 273 U.S. 510 19

Ullmann v. U. S., 350 U.S. 422 15
U. S. v. Jepson, 90 F.S. 983 8
U. S. v. Regan, 232 U.S. 37 13

Western & A. Ry. v. Henderson, 279 U.S. 639 18
Wickwire v. Reinecke, 275 U.S. 101 9

Yazoo & M. Valley R. Co. v. Kirk (1912), 102 Miss. 41, 42 L.N.S. 1172, 58 So. 710, Ann. Cas. 1914C 968 20

Constitutions

United States Constitution:
Fifth Amendment 4, 18
Sixth Amendment 4, 6, 7
Seventh Amendment 4, 6, 7, 10, 12

Rules

Tax Court Rule 32 ..... 3, 4, 18

Statutes

	Pages
Internal Revenue Code of 1939:	
Section 271(a)	3, 4
Section 271(a)(1)	15
Section 272(a)	3, 4, 15
Section 294(a)(1)	17
Section 294(d)	15
Section 294(d)(1)(A)	1, 2, 3, 4, 5, 6, 9, 11, 13, 14, 15, 16, 17, 18
Section 294(d)(2)	5
Section 3600	19
Sections 3740-45	15
Internal Revenue Code of 1954:	
Section 7401	15
Section 7601	19
26 U.S.C. 7451, 7453	6
28 U.S.C.:	
Section 1254(1)	2
Section 1346(a)(1)	13
Sections 7482, 7483	6

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PETITION FOR A WRIT OF CERTIORARI
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for the Ninth Circuit.

George Olshausen, petitioner on a petition in the United States Court of Appeals for the Ninth Circuit to review a decision of the Tax Court of the United States, petitions for a writ of certiorari to the said Court of Appeals, to review that part of the ruling of the Court of Appeals which affirmed the Tax Court's affirmance of penalties under Internal Revenue Code of 1939, sec. 294(d)(1)(A).

OPINION OF LOWER COURTS.

The opinion of the Tax Court appears at R. 52-59. The opinion of the Court of Appeals is to be found at R. 75-9. They appear respectively as Appendices "A" and "B" to this petition. Tax Court opinion unreported, see 30 T.C.; Court of Appeals opinion reported 273 F. 2d 23.

JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered and entered December 10, 1959, and appears as Appendix "C" to this petition. A timely application for Rehearing was filed, which the Court of Appeals denied on January 19, 1960. A copy of the order denying rehearing is attached as Appendix "D" to this petition. On January 22, 1960, the Hon. William E. Orr made an order staying the mandate of the Court of Appeals on condition that a Petition for Certiorari be on file on or before February 29, 1960.

The Supreme Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

The following questions are presented for review:

(1) Is the penalty imposed by 1939 Revenue Code sec. 294(d)(1)(A) within the protection of the Seventh Amendment guaranteeing a jury in civil actions at common law for amounts over $20 (or alternatively

of the Sixth Amendment, guaranteeing a jury in criminal cases)?

(2) May the penalty imposed by sec. 294(d)(1)(A) of the Revenue Code of 1939 be enforced by a deficiency notice, under the language of the sections defining a deficiency and defining the circumstances under which a deficiency notice may be issued (1939 Revenue Code secs. 271(a) and 272(a))?

(3) Is the reversed burden of proof of wiliful neglect imposed by the code section (1939 Code sec. 294(d)(1)(A)) and by Tax Court rule 32, unconstitutional as a deprivation of due process under the Fifth Amendment—

(a) On its face;

(b) On its face, coupled with the added element that penalties are imposed by the same officials who also have the duty of finding revenue, and that every financial penalty imposed serves this purpose;

(c) As applied, in view of the fact that all *taxes* were admittedly paid in full.

(4) May a finding of "wilful neglect" be sustained under said sec. 294(d)(1)(A) on the basis of reliance on an executive interpretation without check of the executive interpretation against the language of the statute?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

a. That part of the Fifth Amendement to the Constitution of the United States guaranteeing due process of law (quoted in Appendix "E");

b. The Sixth Amendment to the Constitution of the United States (quoted in Appendix "E");

c. The Seventh Amendment to the Constitution of the United States (quoted in Appendix "E");

d. Internal Revenue Code of 1939, sec. 271(a) (quoted in Appendix "E");

e. Internal Revenue Code of 1939 sec. 272(a) (quoted in Appendix "E");

f. Internal Revenue Code 1939, sec. 294(d)(1)(A) (quoted in Appendix "E");

g. Tax Court Rule 32 (quoted in Appendix "E").

STATEMENT OF THE CASE.

This is another case involving the construction and application of 1939 Internal Revenue Code sec. 294(d)(1)(A), one phase of which was before this Court in *C.I.R. v. Acker* (Nov. 16, 1959), ... U.S. ....., 4 L.Ed. 2d 127. In that case the Court noted that "the question is still a live one" because of the large number of cases still pending undetermined under that section. (*C.I.R. v. Acker*, 361 U.S. 87, n. 3, 4 L.Ed. 2d 127, 130 n. 3.) The respondent sent out a deficiency notice for penalties under 1939 Code sec. 294(d)(1)(A) for

non-filing of estimated tax returns for the years 1952 and 1953. (R. 6-9.)

The pertinent sentences of Sec. 294(d)(1)(A) are the following:

> "In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. * * *"

Petitioner denied that the failure to file was due to "willful neglect" rather than "to reasonable cause". It was shown without contradiction that for eight years previous to 1952 petitioner had filed only forms 1044, without objection from the Commissioner, though petitioner's returns showed on their face that no estimated tax returns had been filed. (Findings of Tax Court, R. 53.) Previous to 1950 instructions pamphlets issued with Form 1040 did not state that both forms had to be filed; those issued for 1950 and after did so state but obscurely in a manner and place which made the innovation easy to overlook. (Exhibit 6, instructions pamphlets 1948-50 incl., introduced at R. 37.)

The Commissioner imposed, and the Tax Court affirmed, double penalties under both sec. 294(d)(1)(A) and 294(d)(2). The latter was stricken out by the

Court of Appeals on the authority of *C.I.R. v. Acker*, 361 U.S. 87, 4 L.Ed. 2d 127.

The present petition involves the penalties under sub-sec. (d)(1)(A).

Before the Tax Court petitioner raised the defense that the penalty under 1939 Code sec. 294(d)(1)(A) could not be enforced by deficiency notice, and that to do so was a deprivation of the right of trial by jury either under the Seventh or under the Sixth Amendment. (R. 14.) The parts of this defense pertaining to jury trial are quoted as Appendix "F" to this petition.

For the purposes of the record a jury trial was demanded in the Tax Court, and denied. (R. 16.)

JURISDICTION OF LOWER COURTS.

The Tax Court had jurisdiction under 26 U.S.C. 7451, 7453; the Court of Appeals had jurisdiction under 28 U.S.C. 7482, 7483.

REASONS FOR GRANTING WRIT OF CERTIORARI.

1. DENIAL OF JURY TRIAL IN VIOLATION OF VIITH AMENDMENT.

The Court of Appeals holds that a jury trial is unavailable to the taxpayer in a proceeding to enforce the penalty under 1939 Code 294(d)(1)(A). (The imposition of this section is a penalty—*C.I.R. v. Acker*, 361 U.S. 87, 4 L.Ed. 2d 127, 130, supra.)

a. The holding that a proceeding to enforce a civil penalty is not covered by the Seventh (or the Sixth) Amendment should be reviewed by the Supreme Court, because, as said in *Beacon Theatres v. Westover,* 359 U.S. 500, 501:

> "The Court of Appeals for the Ninth Circuit refused the writ, holding that the trial judge had acted within his proper discretion in denying petioner's request for a jury. 252 F. 2d 864. We granted certiorari, 356 U.S. 956, because 'maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.' Dimick v. Schiedt, 293 U.S. 474, 486."

b. There is a conflict among the Circuits as to whether the defendant in an action for a civil penalty is protected by the Seventh Amendment, and so entitled to a jury. While the Ninth Circuit has held that enforcement of a statutory *penalty* is not covered by the Seventh Amendment, the Eighth Circuit, in *Leimer v. Woods,* 196 F. 2d 828, 834, held to the contrary (civil penalty under rent control acts).

(1) In the present opinion, the Court of Appeals of the Ninth Circuit feels that permitting a jury on the enforcement of a *penalty* would necessarily permit a jury in the collection of a *tax:*

> (R. 79) "He contends that what we have here is an action of common law debt for which a jury trial was required. If this were true, all actions for the *collection of taxes* would be actions of

debt, as well as all other statutory proceedings involving a sum of money. Such a broad view of the common law action of debt is not tenable." (Italics added.)

On the other hand, the Eighth Circuit (in an action for a civil penalty under the Rent Control Acts) has taken the opposite view.

Leimer v. Woods, 196 F. 2d 828, 834:

"* * * the matter of recovery has been left by the general language of the statute within the traditional scope and nature of the common law action of debt and as such would conceptually fall within the jury trial guarantee of the Seventh Amendment of the Constitution. We so impliedly recognized and treated it in Shearer v. Porter, 8 Circ. 155 F. 2d 77. Action to recover liquidated damages granted by a statute, whether such damages are intended to be penal in nature or merely remedial, as here, have generally been recognized as constituting, in conceptual nature and legal attributes, common law actions of debt, except where the statute has given them some special and different form. Cf. 26 C.J.S. Debt Action of §2, page 16; United States v. Jepson, D.C.N.J., 90 F. Supp. 983, 984, 985; *Orne v. Roberts,* 51 N.H., 110, 115."

Leimer v. Woods is cited with approval in *Beacon Theatres v. Westover,* 359 U.S. 500, 511.

Leimer v. Woods, 196 F. 2d 828, 834, in turn cites and follows *U.S. v. Jepson,* 90 F.S. 983, 984, 985, which says:

(p. 984) "Long prior to our independence, there had grown up under original writs certain well-

defined actions at common law, among them, the action of debt, covering, among other causes, suits for statutory penalties and qui tam actions:"

(p. 985) "'* * * thus, in this case, though it be an action on the statute, it is an action of debt which is a common law action, and will be tried in a common law manner, * * *.'"

(p. 986) "It is my thought that when a federal statute embraces a common law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactment. It is by such methods that courts lose their power to enforce the Bill of Rights."

We submit that the Ninth Circuit's reasoning is unsound, because it disregards the well-established distinction between a penalty and a tax. *C.I.R. v. Acker*, 4 L. Ed. 2d 127 makes the distinction, holding that the "additions" under 1939 Code sec. 294(d)(1)(A) are a *penalty*. In *Leimer v. Woods*, 196 F. 2d 828, enforcement of a *penalty* is held to be subject to the guarantees of jury trial. On the other hand, collection of a *tax* is not subject to any constitutional right of trial by jury. *(Wickwire v. Reinecke*, 275 U.S. 101.) Since the distinction between a *tax* and a *penalty* exists, holdings as to one do not affect the other.

(2)(a) There is a similar conflict between the Ninth and Eighth Circuits as to what, if anything, will remove enforcement of a money claim from the pro-

tection of the Seventh Amendment. The Ninth Circuit says of decisions of the Supreme Court (discussed below):

> (R. 79) "This is an *express requirement* that an action to recover a penalty be prosecuted as a common law action of debt. The dicta in those cases, therefore, do not stand for the broad position, urged by petitioner, that statutory penalties are always recovered in common law actions of debt." (Italics added.)

This implies that an action to enforce a penalty is covered by the Seventh Amendment only if it is *expressly* made a common law action of debt.

On the other hand, the Eighth Circuit holds, in the language quoted supra from *Leimer v. Woods*, 196 F. 2d 828, 834, that actions to enforce a statutory penalty are actions of debt within the Seventh Amendment, "*except where the statute has given them some special or different form.*"

In other words, the Eighth Circuit holds an action to enforce a penalty to be a common law action for debt except when specifically made otherwise; the Ninth Circuit holds it an action of debt only when expressly made so.

(b) Apart from this, we submit that if a proceeding to enforce a civil penalty is within the Seventh Amendment, it cannot be withdrawn by the simple device either of not providing for procedure, or of providing that there shall be no procedure. If a remedy or a penalty is within the Seventh Amendment, the jury trial cannot be denied merely by stripping

away other procedure. To do so would be to sacrifice substance to form.

(c) The Ninth Circuit confuses the issues when it says:

> (R. 79) "We have under consideration in the instant case a proceeding provided by statute to *test the validity of a penalty assessed* pursuant to that statute. No such action existed at common law, and, therefore, no jury trial is required by the Seventh Amendment." (Italics added.)

The question is not as to the action to *test the validity* of the assessment but whether the *assessment itself* may be imposed without a jury trial (i.e., by deficiency notice, and solely by an executive officer). This was the issue raised in the Tax Court: see Appendix "F". As we show below, as an independent ground of certiorari, the statute does not even clearly provide for imposing the penalty without judicial procedure. The question is especially acute in relation to the penalty under 294(d)(1)(A) which is not automatic, but depends on "willful neglect" vs. "reasonable cause".

(d) For the same reason, the issues mentioned above are not changed by the Court of Appeals' suggestion at R. 78 that

> "Having taken advantage of the deficiency notice procedure by filing a petition in the Tax Court without paying the tax first, petitioner now makes the claim that he was deprived of a jury trial. Such deprivation was due to his own act. If he desired a jury trial, he should have paid the tax first and then sued for a refund in the district court. There is no right to a jury trial without

paying first as a statutory matter. (Flora v. U.S. 375 (sic) U.S. 63 (1958)) and no right to a jury trial at all in tax matters as a constitutional requirement. (Wilshire (sic) v. Reinecke, 275 U.S. 101 (1929)).”

This quotation first slides over the distinction between a tax and a penalty. After the commissioner had filed a deficiency notice there was no remedy except either to go to the Tax Court, or pay the disputed penalty in full as a precondition to a jury trial.

But if the right of trial by jury existed under the Seventh Amendment, it could not be made conditional upon the payment in full (or even in part) of the disputed amount of a disputed penalty. The right of trial by jury guaranteed by the Seventh Amendment is the right substantially as it existed at common law, *Root v. L.S. & M.R.S. Co.*, 105 U.S. 189, 206:

> “* * * the 7th Amendment forbids any infringement of the right of trial by jury, as fixed by the common law.”

Town of Grand Chute v. Winegar, 82 U.S. 373, 375:

> “The right to trial by jury is a great constitutional right, and it is only in exceptional cases and for specified causes that a party may be deprived of it.”
>
> *McKeon v. Central Stamping Co.*, 264 F. 385, 387 (CCA 3).

We have found no case, and the Government has cited none, in which the right of trial by jury at common law was ever made conditional upon the prepay-

ment of a penalty disputed both as to liability and amount. To make a jury trial on a *penalty* depend upon prepayment, would be to subject the right to an unconstitutional burden.

The Court of Appeals cites *Flora v. U.S.*, 357 U.S. 63, without noting that a rehearing was granted in that case, although this was called to its attention in the Petition for Rehearing in the present case.

28 U.S.C. 1346 (a)(1) is one of the statutes fixing the jurisdiction of the federal courts. It does not provide that its procedures shall be exclusive. While it authorizes suits for recovery, both of taxes and penalties, the history of the two is quite different. Taxes had been collected by the executive, and suits to recover illegally paid taxes were something new. *Cheatam v. U.S.* (1876), 92 U.S. 85. On the other hand penalties similar to that under 1939 Code sec. 294(d)(1)(A) were enforced judicially before a jury. *Felton v. U.S.* (1878), 96 U.S. 699.

C. (1) Certiorari should be granted for the further purpose of reconciling conflicting *dicta* of the Supreme Court.

While *Helvering v. Mitchell*, 303 U.S. 396, 402-7, has a dictum that penalties may be enforced administratively, *U.S. v. Regan*, 232 U.S. 37, 44, and *Hepner v. U.S.*, 213 U.S. 103, 115, both say that the defendant is entitled to a jury trial when the government moves to enforce a civil penalty.

The two other cases which the Court of Appeals cites on administrative penalties rest on a special principle, not applicable to internal revenue.

Oceanic Nav. Co. v. Stranahan, 214 U.S. 320 (R. 78) arose from a penalty for the illegal importation of aliens. The right to impose such a penalty administratively was expressly based on the sovereign's right to stop persons and things at its borders. (214 U.S. 320, 334-5.)

Passavant v. U.S., 148 U.S. 214, a customs case, does not expressly mention the sovereign's right to stop people or goods from crossing its boundaries, but later cases put customs and immigration on the same ground. *Oceanic Nav. Co. v. Stranahan,* 214 U.S. 320, 334-5, loc. cit. supra, quoting from *Buttfield v. Stranahan,* 192 U.S. 476, 492-3. This is also the logic of the situation. Besides, *Passavant v. U.S.* was decided partly on the ground that the added duty was "a matter of mere computation"—something not true of the present issue of "reasonable cause" vs. "wilful neglect".

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2. THE COURT OF APPEALS GOES CONTRARY TO THE LANGUAGE OF CONGRESS AND THE OPINION IN C.I.R. v. ACKER, 361 U.S. 87, 4 L.Ed. 2d 127, IN HOLDING PENALTIES UNDER 1939 SEC. 294(d)(1)(A) TO BE WITHIN THE DEFICIENCY NOTICE STATUTES.

In *C.I.R. v. Acker,* 361 U.S. 87, 4 L.Ed. 2d 127, this Court distinguished between a tax and a penalty, holding that the "addition" under 1939 Code 294 (d)(1)(A) was a penalty.

(a) In view of this holding the enforcement of the "addition" under sec. 294(d)(1)(A) is clearly not within the language of the deficiency notice provisions.

1939 Code sec. 271(a)(1) and 272(a) define a deficiency and set forth the circumstances under which a deficiency notice may be issued. Both sections say unequivocally that there must be a deficiency in the *tax*. (See Appendix "E" to this petition.) Enforcement of the *penalty* under sec. 294(d)(1)(A) is left to an action at common law under 1939 Code secs. 3740-45; 1954 Code sec. 7401; and as it was in the act applied in *Felton v. U.S.*, 96 U.S. 699. This construction not only follows the literal wording of 1939 Code secs. 271(a)(1) and 272(a) but also avoids the constitutional problems of denial of jury trial just discussed. It is the construction to be adopted, under the rule of *Ullmann v. U.S.*, 350 U.S. 422, 433, that the literal meaning of a statute must be adopted where it is also the meaning which avoids constitutional difficulties. To the same effect, *Guessefeldt v. McGrath*, 342 U.S. 308, 317-18.

The cases cited by the Court of Appeals are all prior to the decision in *C.I.R. v. Acker*, 4 L.Ed. 2d 127. They overlook the procedure by common-law action, so far as they hold that enforcing a *penalty* by a deficiency notice accords the taxpayer a "right".

All of them confuse a penalty with a tax, and in that way are contrary to *C.I.R. v. Acker*, 4 L.Ed. 2d 127.

In *Davis v. Dudley*, 124 F.S. 426, the taxpayer brought an action to restrain the enforcement of penalties under 1939 Code 294(d) *without any procedure at all*—arguing that he was entitled to deficiency notice procedure. The injunction was granted. This was however done upon the following reasoning, which, we

submit, is squarely contrary to the distinction drawn in *C.I.R. v. Acker,* 4 L.Ed. 2d 127, 130, and n. 4:

> (p. 428) "However, since each subdivision provides that the penalty is to 'be added to the tax', each penalty 'can then be said to become part of the tax': Newsom v. C.I.R., 22 T.C. 225. As a part of the tax, the unpaid total amount of the penalties imposed by these subdivisions is, we think, a deficiency within the meaning of §271(a) because it comprises 'the amount determined by the Commissioner to be the correct amount of the tax due by the taxpayer over the amount of the tax reported by him', plus amounts assessed or collected without assessment."

But *C.I.R. v. Acker* holds that the "addition" under 1939 Code sec. 294(d)(1)(A) is a penalty and *remains a penalty throughout*—it does not "become a part of the tax".

Consequently the authority on which the Court of Appeals relies is contrary to *C.I.R. v. Acker,* 4 L.Ed. 2d 127.

Since *Davis v. Dudley,* 124 F.S. 426, quotes *Newsom v. C.I.R.,* 22 T.C. 225, the foregoing discussion disposes of that case, also cited by the Court of Appeals.

Myers v. C.I.R., 28 T.C. 12, made exactly the same holding, which now appears contrary to that of *C.I.R. v. Acker,* supra. The *Myers* opinion says:

> (p. 13) "The real question for each year is whether the additions to the tax under section 294(d) are to be considered *a part of the tax* for the purposes of section 271(a), which defines a deficiency for present purposes, as the amount by

which the *tax* imposed by chapter 1 exceeds the amount shown as the tax by the taxpayers upon their return."

(p. 14) "Those additions are *part of the whole tax* imposed by chapter 1 and must be considered along with the so-called overassessment of the subchapter B tax for that year to find out whether the Commissioner actually determined a deficiency for the year within the definition of section 271 or whether he determined an overassessment." (Italics added.)

All this is, of course, directly contrary to the holding of *C.I.R. v. Acker*, 4 L.Ed. 2d 127, that the "additions" under 1939 sec. 294(d)(1)(A) are a *penalty*, and *not* a tax.

Besides, it should be noted that when Congress intended an "addition" to be considered "part of the tax" it said so expressly. *Ely v. Walker Dry Goods Co. v. U.S.*, 34 F. 2d 429, 430; *Schneider v. U.S.*, 119 F. 2d 215, 217 (arising respectively under the taxing acts of 1918 and 1921); both cited in *Myers v. C.I.R.*, 28 T.C. 12, 14; so 1939 Code sec. 294 itself provides in subsection (a)(1) that the 6% interest for delayed payments shall be *"part of the tax"*. No such provision is contained in subsection (d)(1)(A).

3. REVERSED BURDEN OF PROOF VIOLATES DUE PROCESS CLAUSE OF VTH AMENDMENT (a) GENERALLY AND (b) AS APPLIED.

a. Reversed Burden of Proof Unconstitutional Generally.

Throwing the burden of proof on the defendant is a deprivation of due process unless there is a rational connection between the facts proved and the presumption which is claimed to follow. (*Western & A. Ry. v. Henderson*, 279 U.S. 639; *Tot v. U.S.*, 319 U.S. 463; *Manley v. Georgia*, 279 U.S. 1; *Morrison v. California*, 291 U.S. 82.)

(1) 1939 Code sec. 294(d)(1)(A) imposes the penalty "unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect." Tax Court Rule 32 (Appendix "E") provides that "the burden of proof shall be on the petitioner".

The Court of Appeals holds that the statute is the source of the reversed presumption (R. 80) but whichever is the source, the problem is the same.

The Court of Appeals holds that:

> (R. 80) "Where one fact (willful neglect) is a logical conclusion from another (failure to file), there is no constitutional infirmity in presuming the second fact from the first, thus putting the burden of proof on the protestant."

The provisions of the present statute, presuming willful neglect are essentially the same as those presuming negligence, held unconstitutional in *W & A Ry v. Henderson*, 279 U.S. 639, supra.

(2) In the present proceeding it has always been admitted that the *taxes* were paid in full (R. 7, 8): "Net income as shown on return—unchanged. Tax liability as shown on the return Account No. A.P. 5310 [O.P. 35226] San Francisco District—Unchanged—Deficiency (Overassessment) in income tax—None)".

Under the definitions of "willful neglect" (cited below) this is the basis for the point that the reversed presumption is not only unconstitutional generally but unconstitutional as applied.

(3) In this case the basic unfairness which makes for the unconstitutionality of the reverse presumption on a penalty, is aggravated by the fact that the Commissioner, who has to make the preliminary finding of fault is the same official who has the obligation of finding and collecting revenue (1939 Code sec. 3600; 1954 Code 7601). *Every finding of a violation will increase the revenue.*

Many jurisdictions have held that such duality violates basic principles of fairness, and with them due process of law. This Court has not yet decided the question. It *was raised* but not decided in *Tumey v. Ohio,* 273 U.S. 510. See argument of counsel, 273 U.S. 510, 512-13, citing the following cases:

Day v. Savadge (1724), Hobart 85, 87, 80 Eng. Rep. R. 235, 236;

City of London v. Wood (1703), 12 Mod. 669, 687, 88 Eng. Rep. R. 1592, 1602;

Landfear v. New Orleans (1832), 4 La. 97, 23 Am. Dec. 477;

Pearce v. Atwood (1816), 13 Mass. 324, 340-41;

Gregory v. Cleveland C. & C.R. Co. (1854), 4 Ohio St. 675, 677;

State ex rel. Colcord v. Young (1893), 31 Fla. 594, 19 L.R.A. 636, 34 Am. St. R. 41, 12 So. 673, 676-7;

Nettleton's Appeal (1859), 28 Conn. 268, 271;

Dimes v. Grand Junction Canal (1852), 3 H.L. Cas. 759, 789, 10 Eng. Rep. R. 301, 313;

Moses v. Julian (1863), 45 N.H. 52, 59, 84 Am. Dec. 114;

Stockwell v. White Lake (1871), 22 Mich. 341, 346;

State, Winans Pros. v. Crane (1873), 36 N.J.L., 394, 397;

Stuart v. Com. (1895), 91 Va. 152, 21 S.E. 246, 247;

Findley v. Smith (1896), 42 W. Va. 299, 26 S.E. 370, 372;

Ex parte Cornwell (1905), 144 Ala. 471, 39 So. 354;

Yazoo & M. Valley R. Co. v. Kirk (1912), 102 Miss. 41, 42 L.N.S. 1172, 58 So. 710, 711, 834; Ann. Cas. 1914C 968;

Barnard v. Bd Education (1898), 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. R. 706, 52 P. 317, 320.

Typical of the position taken by these cases, is the opinion of Chief Justice Holt in *City of London v. Wood* (1703), 12 Mod. 669, 88 Eng. Rep. R. 1592—the earliest case. That was an action on a bond in favor of the City of London, brought in the Mayor's Court.

Chief Justice Holt held the Mayor's Court incompetent to try the case. He added that any statute attempting to authorize it would be void. (p. 687; p. 1602):

> "But the true great point is, that the Court is held before the mayor and aldermen, and the action brought in the names of the mayor and commonalty; and that very man, who is head of the city, and without whom the city has no ability or capacity to sue, is the very person before whom the action is brought; and this cannot be by the rules of any law whatever, for it is against all laws that the same person should be party and judge in the same cause, for it is manifest contradiction, for the party is he that is to complain to the judge, and the judge is to hear the party, the party endeavors to have his will, the judge determines against the will of the party, and his authority to force him to obey his sentence, and can any man act against his own will and force himself to obey? * * * And what my Lord Coke says in *Dr. Bonham's case* in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an act of Parliament should ordain that the same person should be party and judge, or which is the same thing, Judge in his own case, it would be a void Act of Parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong though it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a government Judge and party."

In the present case the problem of an interested official complicates the basic problem of a presumption of guilt. The Collector makes a finding of fault which increases the revenue, and then claims to enter the Tax Court with a presumption in favor of his decision.

b. Reversed Burden of Proof Unconstitutional as Applied.

Apart from the foregoing, the reversed presumption (i.e. presumption of willful neglect) is unconstitutional as applied in view of the fact that *taxes were admittedly paid in full.* (This point was made in the Petition for Rehearing.) The Court of Appeals bases its decision on the theory that "willful neglect" is a logical inference from the fact of non-filing. (The Commissioner has taken the position that the phrase "due to reasonable cause and not to willful neglect" means that the statute undertakes to penalize willful neglect. See *Patchen v. C.I.R.,* 258 F. 2d 544, 552.)

The point that the presumption of willful neglect is unconstitutional as applied, depends *first,* on the definition of willful neglect, and *second,* on whether willful neglect as defined is a reasonable inference where taxes have been paid in full.

Willful neglect or omission is defined in *Felton v. U.S.,* 96 U.S. 699, 702, to require a "bad purpose". This was a tax case. It is the first of a series of cases each of which has been cited with approval. *Felton v. U.S.,* 96 U.S. 699, is cited in *Murdock v. U.S.,* 290 U.S. 389, 394, another tax case, which in turn is cited with approval in *Heikinnen v. U.S.,* 355 U.S. 273, 279. The *Heikinnen* case defines "willful failure" as " 'bad purpose' or '(non-)' justifiable excuse; or the like".

The "bad purpose" in failing to comply with any tax law would obviously be to evade taxes. But *when taxes have been paid in full* this "bad purpose" obviously falls away. None other is suggested.

It is submitted that where taxes have been paid in full throughout, there is no rational basis for inferring a "bad purpose" from the non-filing of an estimated tax return. This being so, the presumption of willful neglect is unconstitutional as applied under the authorities cited, supra.

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4. COURT OF APPEALS GOES CONTRARY TO FELTON v. U. S., 96 U.S. 699, AND RELATED CASES, IN HOLDING "WILLFUL NEGLECT" SUSTAINED BY ACCEPTANCE OF EXECUTIVE INTERPRETATION.

The meaning of "willful neglect" has already been discussed: *Felton v. U.S.*, 96 U.S. 699, states that it requires a bad purpose.

The Court of Appeals' rejection of the claim of laches leads it to a holding on the sufficiency of evidence which is contrary to *Felton v. U.S.*, 96 U.S. 699, and *Heikinnen v. U.S.*, 355 U.S. 273.

It is held that instructions pamphlets which the Commissioner has destroyed are immaterial because, supposedly there is sufficient evidence with or without them. The Court of Appeals holds that "willful neglect" is sufficiently shown by the acceptance of an executive interpretation of a statute without making an independent check of the language of the statute.

The Court of Appeals says:

> (R. 80) "The claim of laches made here is based on the ground that the government destroyed forms and accompanying instruction booklets for years preceding 1950; that such pamphlets if available would have shown that there was no express instruction in them with regard to the filing of declarations of estimated tax as has been contained in such pamphlets since 1950; and that he was therefore, justified in believing that he was not required to file declarations in 1952 and 1953. If it be granted that the production of these pamphlets would show what is claimed for them, the absence of express instructions on the point would not excuse ignorance of the unambiguous requirement contained in §58 of the Internal Revenue Code of 1939."

"Willful Neglect" is here held to be shown by the acceptance of the executive interpretation (the instruction pamphlets accompanying Form 1040) without checking the statute to find whether the executive interpretation was sound or not. (No point is made of the two-year gap, 1950-52, which was briefed and is not now treated as an issue.) Whatever else may be said about unquestioning acceptance of an executive interpretation, we submit it does not, even in a lawyer, show any "bad purpose". The holding in this part of the opinion, that acceptance of an executive interpretation without checking it against the statute, constitutes "willful neglect", is contrary to *Felton v. U.S.*, 96 U.S. 699, and *Heikinnen v. U.S.*, 355 U.S. 273.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted, and the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Dated, San Francisco, California,
February 25, 1960.

Respectfully submitted,
GEORGE OLSHAUSEN,
Petitioner.

(Appendices "A", "B", "C", "D", "E" and "F" Follow.)

Appendix "A"

T. C. Memo. 1958-85

Tax Court of the United States

George Olshausen, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 61127. Filed May 13, 1958.

George Olshausen, pro se.

Leslie T. Jones, Jr., Esq., and T. M. Mather, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

This proceeding involves a deficiency in additions to the tax under section 294 of the Internal Revenue Code of 1939 for each of the years 1952 and 1953, as follows:

		Additions to the tax under—	
Year	Deficiency	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1952	—	$734.84	$489.92
1953	—	114.73	76.50

The issues are: (1) Whether the respondent may proceed by notice of deficiency where the determination involves only additions to the tax; (2) whether such proceeding violates the Fifth and Seventh Amendments to the Constitution; (3) whether the respondent is barred by laches; (4) whether the respondent erred in determining that the failure to file a declaration of estimated tax was not due to reasonable cause; and, (5) whether the respondent properly determined additions to the tax for substantial understatement of estimated tax.

Findings of Fact

Some facts have been stipulated and are found accordingly.

Petitioner is an individual residing at 1238 Pacific Avenue, San Francisco, California. His returns for the taxable years involved were filed with the director of internal revenue for the district of San Francisco, California.

Petitioner is an attorney and has practiced in the Courts of California since 1926.

During the taxable years in question the petitioner did not file a declaration of estimated tax.

Petitioner filed a declaration of estimated tax in either 1943 or 1944. Under the belief the law had been changed, petitioner filed no declaration during the period 1945 to 1953, inclusive.

On January 15th of each year, petitioner regularly filed Form 1040 and paid the tax shown to be due. Petitioner stated he was under the impression that the filing of a declaration of estimated tax was optional if Form 1040 was filed on January 15th. Petitioner was unable to recall how he gained the impression a declaration was unnecessary. Petitioner made no investigation of the law.

During the period 1945 to 1953, inclusive, the returns filed on Form 1040 by the petitioner disclosed his failure to file the declaration of estimated tax.

During the period between 1944 and 1953, petitioner received a refund and was billed for additional amounts due. During such period petitioner was not

contacted by the Internal Revenue Service and believes the adjustments referred to were mathematical.

In each of the years 1946 and 1950, petitioner reported income apportioned under section 107 of the 1939 Code. Petitioner was unable to recall how he found out how to use and compute his income under section 107, but thought he got such information from conversations with other attorneys who were familiar with such section.

In preparing his returns on Form 1040, petitioner used the instruction pamphlet, which usually accompanied the form, as a reference book where a reference to the instructions appeared on the face of Form 1040.

On March 13, 1950, the Commissioner of Internal Revenue issued a press release pertaining to section 294 of the Code. Petitioner was unaware of such release until it was called to his attention at a conference of revenue agents which occurred in the fall of 1955.

In the deficiency notice, the respondent made the following explanation:

You did not file Declarations of Estimated tax nor make timely payments of estimated tax for the taxable years 1952 and 1953. No reasonable cause having been shown, you are liable for the additions to the tax provided by section 294(d)(1)(A) and section 294(d)(2), Internal Revenue Code (1939) for the taxable years 1952 and 1953.

Petitioner's failure to file declarations of estimated tax for the taxable years 1952 and 1953 was not due to reasonable cause.

Opinion

LeMire, Judge: The respondent determined additions to the tax under section 294 of the Internal Revenue Code of 1939 against petitioner for each of the taxable years 1952 and 1953.

The amounts of the additions to the tax determined by the respondent are not in dispute. Petitioner makes no claim that he filed a declaration of estimated tax in the taxable years involved.

Petitioner is a lawyer appearing pro se. His primary contention is that the respondent is not authorized to proceed by notice of deficiency where only additions to the tax are determined, and the notice here in question is not a notice of deficiency within the definition of section 271 of the Code. We find no merit in such contention. It is well settled that a notice involving merely additions to the tax under section 294 is a deficiency notice under section 271, and that the filing of a petition with this Court confers jurisdiction. Herbert Eck, 16 T.C. 511, affd. 202 F. 2d 750, certiorari denied 346 U.S. 822; E. C. Newsom, 22 T.C. 225, affd. per curiam 219 F. 2d 444; Union Telephone Co., 41 B.T.A. 152; Ely & Walker Dry-Goods Co. v. United States, 34 F. 2d 429; certiorari denied 281 U.S. 755; Charles E. Myers, Sr., 28 T.C. 12.

The petitioner further argues that to uphold the respondent's right to proceed by deficiency notice deprives him of the right to a jury trial under the Seventh Amendment, and violates the due process clause under the Fifth Amendment to the Constitution.

The constitutionality of sections 58 and 294 here involved has recently been considered and upheld. Erwin v. Granquist, F. 2d Feb. 13, 1958) certiorari applied for. The Seventh Amendment, relating to a jury trial, applies only to actions at law and not to statutory proceedings. Wickwire v. Reinecke, 275 U.S. 101. Petitioner could pay the tax, sue for a refund, and thus have a jury trial. We find no merit in either of petitioner's contentions. The defense of laches is equally without merit. The Supreme Court in a number of cases has held that the United States is not subject to the defense of laches, if any here exist. United States v. Summerlin, 310 U.S. 414, 416 (citing authorities).

The issue whether the petitioner's failure to meet the requirements of section 58 was due to reasonable cause and not to wilful neglect presents a factual question to be resolved upon the merits.

Section 294(d)(1)(A) imposes the duty upon the Commissioner to determine, in the first instance, whether or not the failure to file a declaration of estimated tax is due to reasonable cause. Such a determination was made and is prima facie correct. The burden is upon the petitioner to establish that the failure was due to reasonable cause. Wickwire v. Reinecke, supra; Welch v. Helvering, 290 U.S. 111.

Reasonable cause is defined as the "exercise of ordinary business care and prudence." In re Fisk's Estate, 203 F. 2d 358. Petitioner contends that the evidence in the instant case brings him within that definition.

As justification for his failure to file the declarations, petitioner contends that no one connected with the revenue service ever called his attention to the necessity of filing declarations, although his regular returns filed on Form 1040 clearly disclose that he had not filed any declarations. Ignorance of the law is no excuse. The record, however, shows that petitioner was familiar with the requirements of the law since in either 1943 or 1944 he did file such a declaration.

Petitioner testified that he gained the impression that there had been a change in the policy of the Internal Revenue Service not to require a declaration where Form 1040 was filed by January 15th. Petitioner could not recall where he gained such impression.

As an additional excuse, petitioner testified that Form 1040 made no reference to the necessity to file a declaration and since the questions pertaining to withholding on Form 1040 were not changed over the years, he did not examine the instruction pamphlet.

Petitioner could not rely upon the failure of the revenue service to call his omission to his attention. This record persuades us that petitioner did not use reasonable diligence in ascertaining his duty to comply with the law. Any reasonable and prudent person would not rely upon an impression, but would consult the current law. Neither indifference nor reliance upon rumor constitute reasonable cause. Howard M. Fischer, 25 T.C. 102; Harold C. Marbut, 28

T.C. 687; Charles M. Kilborn, 29 T.C. 102 (on appeal C.A.-5).

Upon the entire record we are of the opinion that petitioner has not carried the burden of showing that his failure to file declarations of estimated tax in the taxable years 1952 and 1953 was due to reasonable cause and we have so found as a fact.

Finally, petitioner contends that since he filed no declarations of estimated tax, the additions to the tax under section 294(d)(2) cannot be sustained. A number of District Court decisions support the petitioner.[1]

This Court has consistently held that the additions to the tax under sections 294(d)(1)(A) and 294(d)(2) are cumulative. G. E. Fuller, 20 T.C. 308; H. R. Smith, 20 T.C. 663; Harry Hartley, 23 T.C. 353; Clark v. Commissioner, ... F. 2d ..... (Mar. 13, 1958) affirming a memorandum opinion of this Court. See also, Peterson v. United States, 141 F. Supp. 382; Furrow v. United States, 150 F. Supp. 581; Palmisano v. United States, 159 F. Supp. 98.

The respondent's determination as to the additions to the tax under sections 294(d)(1)(A) and 294(d)(2) for each of the taxable years 1952 and 1953 is sustained.

Decision will be entered for the respondent.

Served May 13, 1958.

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[1] United States v. Ridley, 120 F. Supp. 530; Jones v. Wood, 151 F. Supp. 678; Owens v. United States, 134 F. Supp. 31; Powell v. Granquist, 146 F. Supp. 308; Stengle v. United States, 150 F. Supp. 364; Barnwell v. United States, ... F. Supp. ..... (Feb. 4, 1958).

The Tax Court of the United States
Washington

Docket No. 61127

GEORGE OLSHAUSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed May 13, 1958, it is

Ordered and Decided: That there are additions to the tax under sections 294(d)(1)(A) and 294 (d)(2), for the years 1952 and 1953, as follows:

	Additions to the tax under	
Year	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1952	$734.84	$489.92
1953	114.73	76.50

Entered May 15, 1958.

[Seal] /s/ C. P. LeMIRE,
Judge.

Served May 16, 1958.

Appendix "B"

United States Court of Appeals for the Ninth Circuit

GEORGE OLSHAUSEN, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 16,183 Dec. 10, 1959

Petition to Review a Decision of the Tax Court of the United States.

Before: HEALY, ORR and HAMLIN, Circuit Judges.

ORR, Circuit Judge:

For failure to file declarations of estimated tax for the years 1952 and 1953, the Commissioner of Internal Revenue pursuant to §294 of the Internal Revenue Code of 1939 assessed additions to petitioner's tax as penalties for said failure[1] and also for substantial

[1] §294(d)(1)(A): "Failure to File Declaration. In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid . . ."

underestimate of estimated tax.[2] The Tax Court sustained the findings of the Commissioner and taxpayer petitions for review.

At the time of argument and submission of the case, there was pending for hearing before the Supreme Court of the United States the case of Commissioner v. Acker, ... U.S. ..... (1959), in which the question of whether sections 294(d)(1)(A) and 294(d)(2) provided cumulative penalties for failing to file was under consideration. The Tax Court had held in the instant case that the Commissioner was correct in assessing two penalties for the reason that petitioner's failure to file a declaration amounted to an estimation of zero tax and, therefore, was a substantial underestimate. Petitioner challenges this holding. We have withheld our opinion pending a determination of the question by the Supreme Court. A decision in the Acker case was recently rendered wherein it was held that the two sections were not cumulative; that section 294(d)(2) has no application in the case of a failure to file a declaration of estimated tax. The decision as we read it settles another controversy existing between the Commissioner and the petitioner, to wit, that the addition to the tax as provided in section 294(d)(1)(A) is a penalty.

While the case of Commissioner v. Acker resolves the cumulative penalty issue in favor of petitioner, he

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[2] §294(d)(2): Substantial Underestimate of Estimated Tax. If 80 per centum of the tax . . . exceeds the estimated tax . . . there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser . . ."

presents other claimed errors which require disposition:

Petitioner argues that the deficiency notice procedure set up in the Code (§272 I.R.C. 1939) cannot be used in enforcing the additions to the tax under §294 where there is no deficiency in the tax apart from the additions. The following cases are opposed to petitioner's contention: Davis v. Dudley, 124 F. Supp. 426 (W.D. Pa. 1954); Myers v. C.I.R., 28 T.C. 12 (1957); Newsom v. C.I.R., 22 T.C. 225 (1954), aff'd per curiam, 219 F.2d 444 (5th Cir. 1955).[3] Be-

[3]These cases hold the additions imposed by §294 to be deficiencies within the meaning of §271 I.R.C. 1939 which defines "deficiency" as follows: ". . . 'deficiency' means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made."

The deficiency notice in the present case was sent in 1955. §7851 (6) I.R.C. 1954 directs that after January 1, 1955 chapters 63-65 I.R.C. 1954, relating to assessment, collection and refund of taxes, shall apply to taxes imposed by the 1939 Code. §6211, defining "deficiency" in the 1954 Code, is in chapter 63. It defines "deficiency" by referring to the amounts imposed by subtitles A and B. This engenders confusion since §294, which was in subtitle A in the 1939 Code, is in subtitle F in the 1954 Code as §6654 and the additions imposed by the latter section are not within the definition of "deficiency" in the 1954 Code (but are treated as deficiencies for purposes of collection by virtue of §6659 which, being in chapter 68, does not apply to taxes imposed by the 1939 Code). As a tax imposed by the 1939 Code, §294 additions would be within the "deficiency" definition of the 1954 Code if §6211 is read as referring to subtitle A in the 1939 Code when that Code is involved, but such a contention is doubtful since a statute in referring to subtitles should be read as referring to subtitles in the statute the reference appears in. (Some support for reading it as a reference to the 1939 Code is found in §7851(7)(c), but problems of construction would still remain.)

fore the creation of the Tax Court (originally the Board of Tax Appeals), the rule was "pay first and litigate later." The deficiency notice procedure now provides taxpayers with the alternative of petitioning the Tax Court within 90 days after the deficiency notice is issued and being able to contest the assessment before that court without having to pay the assessment first. §272 I.R.C. 1939. This was intended to benefit taxpayers. 65 Cong. Rec. 2429. We are impressed by the reasoning employed in Davis v. Dudley, supra: ". . . [T]he imposition of the delinquency penalties in subdivisions 294(d)(1)(A) and (B) depends exclusively upon the judgment of the Commissioner. Hence, in the absence of unequivocal language to the contrary, . . . we think that this type of penalty should be construed as a deficiency in order that the judgment of the Commissioner may be tested by the Tax Court as a safeguard against erroneous assessments and compulsory payment pending final decision." (At p. 428). This court in Granquist v. Hackleman, supra, cited the above mentioned cases with approval ". . . to illustrate a recognition in the courts of the underlying reasons in favor of affording a taxpayer a prepayment review in the Tax Court. . . . Where the statute does not specifically, by its pre-

We arrive at the same result by a slightly different path. Since the definition of "deficiency" contained in §6211 of the 1954 Code cannot accurately be applied to the 1939 Code as regards the additions imposed by §294 because of the rearrangement of the content of the subtitles, we construe the mandate in §7851(6)(B) I.R.C. 1954 as directing that the 1954 Code govern only when capable of application, and since §6211 is not so capable in this case, we revert to the definition contained in the 1939 Code of "deficiency" and the cases cited above interpreting it.

cise language, take away this right, . . . we believe that the taxpayer should be afforded an opportunity to file suit in the Tax Court to determine his liability. The requirement of a 90 day deficiency notice affords this right to the taxpayer." (At p. 15)

Petitioner urges, however, that we construe the statute as not affording taxpayers this right in order to avoid alleged "serious constitutional questions." Having taken advantage of the deficiency notice procedure by filing a petition in the Tax Court without paying the tax first, petitioner now makes the claim that he was deprived thereby of a jury trial. Such deprivation was due to his own act. If he desired a jury trial, he should have paid the tax first and then sued for a refund in the district court. There is no right to a jury trial without paying first as a statutory matter (Flora v. U.S., 375 U.S. 63 (1958) and no right to a jury trial at all in tax matters as a constitutional requirement (Wilshire v. Reinecke, 275 U.S. 101 (1929)). The Sixth Amendment to the Constitution applies only to criminal proceedings. Even though §294(d)(1)(A) imposes a penalty (Commissioner v. Acker, supra), it has long been settled that Congress may provide civil proceedings for the collection of penalties which are civil or remedial sanctions rather than punitive, and provide that the determination of the facts upon which the liability for such a penalty is based may be by executive officers or administrative agencies. Helvering v. Mitchell, 303 U.S. 391 (1938); Oceanic Nav. Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. U.S., 213 U.S. 103

(1909); Passavant v. U.S., 148 U.S. 214 (1893). The court in Helvering v. Mitchell held that the double jeopardy clause had no application in a proceeding to assert an additional tax of 50% of a deficiency due to fraud imposed by §293(b) of the Revenue Act of 1928 since such a proceeding was a civil one. The court stated: "The remedial character of sanctions imposing additions to a tax has been made clear by this court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." (At p. 401) The additions to the tax imposed by §294(d)(1)(A) are equally remedial in character. Congress has, therefore, properly provided civil proceedings in which assessment of such additions may be tested. The Sixth Amendment has no application to such proceedings. See Walker v. U.S., 240 F.2d 601 (5th Cir. 1957).

Petitioner asserts in the alternative that he is entitled to a jury trial by reason of the Seventh Amendment to the Constitution which guarantees a jury trial where required at common law. He contends that what we have here is an action of common law debt for which a jury trial was required. If this were true, all action for the collection of taxes would be actions of debt, as would all other statutory proceedings involving a sum of money. Such a broad view of the common law action of debt is not tenable. Petitioner cites U.S. v. Regan, 232 U.S. 37 (1914) and

Hepner v. U.S., supra, in support of his contention. The Supreme Court in both of those cases was applying a statute which provided that the penalty imposed therein ". . . may be sued for and recovered by the United States . . . as debts of like amount are recovered in the courts of the United States . . ." Alien Immigration Act, §5, 34 Stat. 898, 900. This is an express requirement that an action to recover the penalty be prosecuted as a common law action of debt. The dicta in these cases, therefore, do not stand for the broad proposition, urged by petitioner, that statutory penalties are always recovered in common law actions of debt. We have under consideration in the instant case a proceeding provided for by statute to test the validity of a penalty assessed pursuant to that statute. No such action existed at common law, and, therefore, no jury trial is required by the Seventh Amendment.

Petitioner asserts that a further constitutional issue arises if we construe the statute as giving the Tax Court jurisdiction to determine the propriety of additions to the tax assessed pursuant to §294. He argues that when a case comes into the Tax Court, Rule 32 of that court places an unconstitutional burden on taxpayers by requiring them to prove that their failure to file was due to reasonable cause rather than willful neglect. The answer is that it is not Rule 32 of the Tax Court which places the burden on the taxpayer, but §294 itself (see footnote 1 supra). The burden of proof, therefore, would be the same in the district court or the court of claims. Where one fact

(willful neglect) is a logical conclusion from another (failure to file), there is no constitutional infirmity in presuming the second fact from the first, thus putting the burden of proof on the protestant. See Boynton v. Pedrick, 228 F.2d 745 (2d Cir. 1955), cert. den., 351 U.S. 938, rehearing den., 351 U.S. 990; and see also Helvering v. Taylor, 293 U.S. 507, 515 (1935). An almost impossible burden would be placed on the government if it had to prove willful neglect by evidence in addition to a taxpayer's failure to file, whereas the taxpayer can easily explain his failure if good cause therefor existed. The allocation of the burden of proof made by §294 is, therefore, founded in good common sense and fairplay.

In any event, petitioner argues, there was no evidence of willful neglect to support such a finding. Since the burden was on the taxpayer to explain his failure to the satisfaction of the Commissioner, a lack of evidence of willful neglect would not negate such a finding. But, be that as it may, a review of the record convinces us that it contains ample evidence to support such a finding, such as spaces on the form 1040 for estimated tax and the fact that petitioner had filed in prior years.

We have the further contention that the government is barred from prosecuting its claim because of laches. This contention is answered by the case of U.S. v. Summerlin, 310 U.S. 414, 416 (1940) which holds that laches is no defense against the United States. Petitioner attempts to distinguish the Summerlin case on the ground that "there the defense of laches did not also raise a constitutional issue." This

attempt to thus distinguish Summerlin has no validity because there is no deprivation of constitutional rights in the instant case. The claim of laches made here is based on the ground that the government destroyed forms and accompanying instruction booklets for years preceding 1950; that such pamphlets if available would have shown that there was no express instruction in them with regard to the filing of declarations of estimated tax as has been contained in such pamphlets since 1950; and that he was, therefore, justified in believing that he was not required to file declarations in 1952 and 1953. If it be granted that the production of these pamphlets would show what is claimed for them, the absence of express instructions on the point would not excuse ignorance of the unambiguous requirement contained in §58 of the Internal Revenue Code of 1939.

We see no merit in petitioner's contention that he should be excused from the payment of the additional tax because had demands for the statutory penalty been made earlier he would have been required to pay less. No such shift in responsibility can be sanctioned. Petitioner could have avoided all liability by complying with a statutory requirement which he should have known existed.

The case is remanded to the Tax Court with instructions that it strike from its judgment all penalties added under §294(d)(2), and, as thus amended, the judgment of the Tax Court is affirmed.

(Endorsed:) Opinion. Filed Dec. 10, 1959.
Paul P. O'Brien, Clerk.

Appendix "C"

United States Court of Appeals
for the Ninth Circuit

GEORGE OLSHAUSEN, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 16,183

JUDGMENT

Petition to Review a Decision of the Tax Court of the United States.

This cause came on to be heard on the Transcript of the Record from the Tax Court of the United States, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that this cause be, and hereby is remanded to the said Tax Court with instructions that it strike from its decision all penalties added under Section 294(d)(2), and as thus amended, the Decision of the said Tax Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered: December 10, 1959
Paul P. O'Brien, Clerk

Appendix "D"

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday,
January 19, 1960

Before: HEALY, ORR and HAMLIN, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Petitioner, filed December 30, 1959, and within time allowed therefor by Rule of Court for a rehearing of the above cause, be, and hereby is denied.

Appendix "E"

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

DEFINITION OF DEFICIENCY

1939 Code Sec. 271.

(a) In general. As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

PROCEDURE IN GENERAL

1939 Code Sec. 272.

(a)(1) Petition to The Tax Court of the United States. If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail.

ADDITIONS TO THE TAX IN CASE OF NONPAYMENT

1939 Code Sec. 294(d) Estimated tax

(1) Failure to file declaration or pay installment of estimated tax

(A) Failure to file declaration. In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid.

TAX COURT RULE 32

Burden of Proof. The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent.

Appendix "F"

(h) The Commissioner of Internal Revenue erred in issuing a deficiency notice at all, and erred in holding that the present case falls within the deficiency notice procedure;

(i) The Commissioner of Internal Revenue erred in failing to hold that a deficiency notice in the present case violates petitioner's constitutional rights in each of the following respects:

First: It denies the right of trial by jury in violation of the VIth Amendment to the United States Constitution, where the amounts claimed are criminal penalties, and in violation of the VIIth Amendment to the United States Constitution where the amounts claimed are civil penalties or interest;